

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ERLINDA MEDRANO,	)	
	)	No. CV-09-0272-CI
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on September 7, 2010. (Ct. Rec. 12, 17.) Attorney Lora Lee Stover represents Plaintiff Erlinda Medrano ("Plaintiff"); Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 17) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 12).

**JURISDICTION**

On November 14, 2005, Plaintiff filed an application for Supplemental Security Income ("SSI") benefits, alleging disability since September 1, 2001. (Tr. 55, 126-127.) Plaintiff's applications were denied initially and on reconsideration. An administrative hearing was held before Administrative Law Judge

1 ("ALJ") Hayward C. Reed on February 7, 2008. (Tr. 535-589.) On  
2 April 21, 2008, the ALJ issued a decision finding that Plaintiff was  
3 not disabled. (Tr. 10-19.) On July 23, 2009, the Appeals Council  
4 denied Plaintiff's request for review. (Tr. 3-5.) Therefore, the  
5 ALJ's decision became the final decision of the Commissioner, which  
6 is appealable to the district court pursuant to 42 U.S.C. § 405(g).  
7 Plaintiff filed an action for judicial review pursuant to 42 U.S.C.  
8 § 405(g) on September 3, 2009. (Ct. Rec. 1.)

9 **STATEMENT OF FACTS**

10 The facts have been presented in the administrative hearing  
11 transcript and, therefore, will only be summarized here. Plaintiff  
12 was 41 years old on the date of the ALJ's decision. Plaintiff  
13 completed the eighth grade in school and has past work as a fast  
14 food cashier, janitor, food sorter, housekeeper, and meat packer.  
15 (Tr. 552, 575-576.) Plaintiff indicated that she became disabled on  
16 September 1, 2001, due to mental illness and knee and back problems.  
17 (Tr. 126-127.)

18 Plaintiff testified that it hurts her back and knees to stand  
19 or sit for any length of time. (Tr. 558.) She stated that she  
20 could sit for forty-five minutes before needing to stand and stand  
21 for thirty to forty-five minutes before needing to sit. (Tr. 564.)  
22 Plaintiff also complained of carpal tunnel syndrome in both wrists  
23 (surgery performed on the left) and pain in her left shoulder due to  
24 a recent accident resulting in a broken collar bone. (Tr. 558-561.)

25 At the administrative hearing, Plaintiff admitted to using  
26 cocaine in December of 2005, methamphetamine in September of 2006,  
27 and marijuana about two months prior to the February 2008 hearing.  
28 (Tr. 571-572.)

**SEQUENTIAL EVALUATION PROCESS**

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if her impairments are of such severity that Plaintiff is not only unable to do her previous work but cannot, considering Plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if she is engaged in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the decision maker proceeds to step two, which determines whether Plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

If Plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares Plaintiff's impairment with a number of listed impairments

acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. § 404, Subpt. P, App. 1. If the impairment meets or equals one of the listed impairments, Plaintiff is conclusively presumed to be disabled. If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents Plaintiff from performing work she has performed in the past. If Plaintiff is able to perform her previous work, she is not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff cannot perform this work, the fifth and final step in the process determines whether Plaintiff is able to perform other work in the national economy in view of her residual functional capacity and her age, education and past work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon Plaintiff to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once Plaintiff establishes that a physical or mental impairment prevents her from engaging in her previous occupation. The burden then shifts to the Commissioner to show (1) that Plaintiff can perform other substantial gainful activity, and (2) that a "significant number of jobs exist in the national economy" which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold

1 the Commissioner's decision, made through an ALJ, when the  
2 determination is not based on legal error and is supported by  
3 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
4 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
5 "The [Commissioner's] determination that a plaintiff is not disabled  
6 will be upheld if the findings of fact are supported by substantial  
7 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)  
8 (*citing* 42 U.S.C. § 405(g)). Substantial evidence is more than a  
9 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup>  
10 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
11 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of*  
12 *Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988).  
13 Substantial evidence "means such evidence as a reasonable mind might  
14 accept as adequate to support a conclusion." *Richardson v. Perales*,  
15 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences  
16 and conclusions as the [Commissioner] may reasonably draw from the  
17 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,  
18 293 (9<sup>th</sup> Cir. 1965). On review, the court considers the record as  
19 a whole, not just the evidence supporting the decision of the  
20 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)  
21 (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

22 It is the role of the trier of fact, not this court, to resolve  
23 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
24 supports more than one rational interpretation, the court may not  
25 substitute its judgment for that of the Commissioner. *Tackett*, 180  
26 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
27 Nevertheless, a decision supported by substantial evidence will  
28 still be set aside if the proper legal standards were not applied in

1 weighing the evidence and making the decision. *Browner v. Secretary*  
2 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988).  
3 Thus, if there is substantial evidence to support the administrative  
4 findings, or if there is conflicting evidence that will support a  
5 finding of either disability or nondisability, the finding of the  
6 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
7 1230 (9<sup>th</sup> Cir. 1987).

#### 8 **ALJ'S FINDINGS**

9 The ALJ found at step one that Plaintiff has not engaged in  
10 substantial gainful activity since November 14, 2005, the  
11 application date. (Tr. 12.) At step two, the ALJ determined that  
12 Plaintiff had the following severe impairments: bilateral knee pain,  
13 low back pain, somatoform disorder, and personality disorder. (Tr.  
14 12-13.) The ALJ found that Plaintiff did not have an impairment or  
15 combination of impairments that meets or medically equals one of the  
16 Listings impairments. (Tr. 13-14.)

17 After considering the record, the ALJ concluded that Plaintiff  
18 had the residual functional capacity ("RFC") to perform light  
19 exertion work with certain restrictions. (Tr. 14.) The ALJ  
20 determined that Plaintiff could only occasionally climb, stoop,  
21 kneel, crouch, and crawl, and only sit for 30 minutes at a time and  
22 stand for one hour at a time. (Tr. 14.) The ALJ also indicated  
23 that Plaintiff was moderately limited in her ability to get along  
24 with coworkers or peers without distracting them or exhibiting  
25 behavioral extremes. (Tr. 14-15.)

26 At step four, the ALJ determined that Plaintiff was unable to  
27 perform any past relevant work. (Tr. 17.) However, based on the  
28 testimony of the vocational expert and considering Plaintiff's age,

1 educational background, work experience and RFC, the ALJ concluded  
2 that Plaintiff could perform work that existed in significant  
3 numbers in the national economy. (Tr. 18.) Accordingly, the ALJ  
4 determined at step five of the sequential evaluation process that  
5 Plaintiff was not disabled within the meaning of the Social Security  
6 Act. (Tr. 18-19.)

#### 7 **ISSUES**

8 Plaintiff contends that the ALJ's determination is not  
9 supported by substantial evidence. Specifically, she argues that:

10 1. The ALJ's assessment of Plaintiff's mental limitations is  
11 not in conformity with the evidence of record;

12 2. The ALJ's finding that Plaintiff is capable of a  
13 restricted range of light duty work is not proper based upon the  
14 evidence of record;

15 3. The ALJ's opinion that Plaintiff is not credible is not  
16 supported by the record; and

17 4. The ALJ's RFC assessment is not in conformity with the  
18 evidence of record.

#### 19 **DISCUSSION**

##### 20 **I. Plaintiff's Credibility**

21 Plaintiff argues that the ALJ erred in assessing her  
22 credibility and by not giving her complaints of pain greater weight.  
23 (Ct. Rec. 13 at 13-14).

24 It is the province of the ALJ to make credibility  
25 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
26 1995). However, the ALJ's findings must be supported by specific  
27 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
28 1990). Once Plaintiff produces medical evidence of an underlying

1 impairment, the ALJ may not discredit Plaintiff's testimony as to  
2 the severity of an impairment because it is unsupported by medical  
3 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998).  
4 Absent affirmative evidence of malingering, the ALJ's reasons for  
5 rejecting Plaintiff's testimony must be "clear and convincing."  
6 *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General  
7 findings are insufficient: rather the ALJ must identify what  
8 testimony is not credible and what evidence undermines the  
9 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,  
10 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993). The ALJ may consider at least the  
11 following factors when weighing Plaintiff's credibility:  
12 Plaintiff's reputation for truthfulness, inconsistencies either in  
13 her testimony or between her testimony and her conduct, Plaintiff's  
14 daily activities, Plaintiff's work record, and testimony from  
15 physicians and third parties concerning the nature, severity, and  
16 effect of the symptoms of which she complains. *Thomas v. Barnhart*,  
17 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002). If the ALJ's credibility  
18 finding is supported by substantial evidence in the record, the  
19 court must not engage in second-guessing. *Id.* at 959.

20 The ALJ considered the evidence of record and concluded that  
21 Plaintiff's medically determinable impairments could reasonably be  
22 expected to produce the alleged symptoms, but that Plaintiff's  
23 statements concerning the intensity, persistence and limiting  
24 effects of these symptoms were not entirely credible. (Tr. 15.)  
25 The ALJ discussed the evidence of record and determined that  
26 Plaintiff's testimony was not fully credible. (Tr. 15-16.)

27 As indicated by the ALJ, the record includes statements by  
28 doctors suggesting Plaintiff was engaged in malingering,



1 exaggeration and misrepresentation. (Tr. 15-16.) In March 2007,  
2 Kathy Jamieson-Turner, M.S., examined Plaintiff under the  
3 supervision of Frank Rosekrans, Ph.D. (Tr. 277-285.) The  
4 Personality Assessment Inventory ("PAI") and the Minnesota  
5 Multiphasic Personality Inventory ("MMPI") suggested exaggeration  
6 and malingering. (Tr. 280, 285.) In March 2008, Dr. Rosekrans  
7 noted the possibility that Plaintiff exaggerated her symptoms on  
8 exam. (Tr. 492.) Although he did not diagnose malingering, Dr.  
9 Rosekrans indicated that the "inconsistencies in her history, the  
10 drug-seeking behaviors, and over-reporting of symptoms in this and  
11 previous evaluations suggests some degree of malingering." (Tr.  
12 494.)

13 The ALJ also noted that there are many inconsistencies between  
14 Plaintiff's statements and the objective medical evidence. (Tr.  
15 15.) For example, Plaintiff testified that she could only sit for  
16 45 minutes at a time (Tr. 564), but Dr. Rosekrans observed that she  
17 sat for 5½ hours during his exam, without medication and with no  
18 apparent signs of pain (Tr. 488). (Tr. 16.) Inconsistencies in a  
19 disability claimant's testimony supports a decision by the ALJ that  
20 a claimant lacks credibility. *Nyman v. Heckler*, 779 F.2d 528, 531  
21 (9<sup>th</sup> Cir. 1986).

22 The ALJ further noted that Plaintiff has shown drug-seeking  
23 behavior which involved an element of deception in order to obtain  
24 medication. (Tr. 16.) Community Health Association records  
25 indicate drug-seeking and addictive behavior. (Tr. 12, 350-351,  
26 355-356.) In Dr. Rosekrans' March 2008 report, he indicated that  
27 "it is clear that she engages in drug-seeking behavior." (Tr. 495.)  
28 An ALJ may properly consider evidence of a claimant's drug use and

1 drug-seeking behavior in assessing credibility. *Edlund v.*  
2 *Massanari*, 253 F.3d 1152, 1157 (9<sup>th</sup> Cir. 2001).

3 The ALJ additionally noted that Plaintiff did not appear to be  
4 particularly motivated or interested in working, which called into  
5 question whether it is her impairments or her lack of desire to work  
6 that caused her to seek disability. (Tr. 16.) The Ninth Circuit  
7 has recognized that the ALJ may properly consider the issue of  
8 motivation in assessing credibility. *Matney v. Sullivan*, 981 F.2d  
9 1016, 1020 (9<sup>th</sup> Cir. 1992).

10 Finally, the ALJ indicated that Plaintiff has received mental  
11 health treatment on a very infrequent basis. The ALJ stated that if  
12 Plaintiff's mental health problems were not severe enough to  
13 motivate her to seek treatment, it is difficult to accept her  
14 assertion that they are disabling. (Tr. 16.) The Ninth Circuit,  
15 however, has determined that the fact that a claimant does not "seek  
16 treatment for a mental disorder until late in the day" is not a  
17 proper basis on which to find a claimant not credible regarding that  
18 condition. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9<sup>th</sup> Cir. 1996)  
19 (noting that those with depression often do not recognize their  
20 condition reflects potentially serious mental illness). It was thus  
21 not proper for the ALJ to consider Plaintiff's limited mental health  
22 treatment as evidence of a lack of a credibility. Nevertheless, an  
23 error in the credibility analysis is harmless error when substantial  
24 evidence supports the ALJ's ultimate conclusion that Plaintiff's  
25 testimony was not credible. *Carmickle v. Comm'r, Soc. Sec. Admin.*,  
26 533 F.3d 1155, 1162-1163 (9<sup>th</sup> Cir. 2008); *Batson v. Comm'r Soc. Sec.*  
27 *Admin.*, 359 F.3d 1190, 1197 (9<sup>th</sup> Cir. 2004); *Curry v. Sullivan*, 925  
28 F.2d 1127, 1131 (9<sup>th</sup> Cir. 1990); *Booz v. Sec. of Health and Human*

1 *Services*, 734 F.2d 1378, 1380 (9<sup>th</sup> Cir. 1984). In this case, the ALJ  
2 cited several valid reasons supported by substantial evidence in the  
3 record for finding Plaintiff not fully credible. *See supra*. As a  
4 result, this erroneous reason offered by the ALJ constitutes  
5 harmless error.

6 After reviewing the record, the undersigned finds that the  
7 reasons provided by the ALJ for finding Plaintiff not fully  
8 credible, as outlined above, are clear and convincing and supported  
9 by substantial evidence. Accordingly, the ALJ did not err by  
10 concluding that Plaintiff's testimony was not entirely credible in  
11 this case.

## 12 **II. RFC Determination**

13 Plaintiff asserts that the ALJ failed to properly assess her  
14 RFC. (Ct. Rec. 13 at 14-16.) RFC is defined as the most one can  
15 still do despite the individual's limitations. 20 C.F.R. §§  
16 404.1545(a)(1), 416.945(a)(1). In making a RFC determination, the  
17 ALJ considers Plaintiff's symptoms, including pain, and the extent  
18 to which these symptoms can be reasonably accepted as consistent  
19 with the objective medical evidence and other evidence of record.  
20 The ALJ also considers the opinions of acceptable medical sources  
21 which reflect the judgment about the nature and severity of the  
22 impairments and resulting limitations.

23 The ALJ found that Plaintiff had the RFC to perform light  
24 exertion level work with certain restrictions. (Tr. 14.) The ALJ  
25 determined that Plaintiff could only occasionally climb, stoop,  
26 kneel, crouch, and crawl, and only sit for 30 minutes at a time and  
27 stand for one hour at a time. (Tr. 14.) The ALJ also indicated  
28 that Plaintiff was moderately limited in her ability to get along

1 with coworkers or peers without distracting them or exhibiting  
2 behavioral extremes. (Tr. 14-15.)

3 **A. Mental Limitations**

4 With respect to Plaintiff's mental ability, Plaintiff argues  
5 that limitations assessed by Drs. Mabee and Rosekrans reflect far  
6 greater restrictions than a moderate limitation on her ability to  
7 get along with coworkers or peers without distracting them or  
8 exhibiting behavioral extremes. (Ct. Rec. 13 at 11-13, 15-16).

9 On January 15, 2006, John F. McRae, Ph.D., reviewed the records  
10 and completed a assessment of Plaintiff's mental abilities. (Tr.  
11 142-159.) Dr. McRae noted only mild restriction of activities of  
12 daily living, mild difficulties in maintaining social functioning  
13 and mild difficulties maintaining concentration, persistence or  
14 pace. (Tr. 152.) Dr. McRae found Plaintiff "not significantly  
15 limited" in all areas other than a finding that Plaintiff was  
16 moderately limited in the ability to get along with coworkers or  
17 peers without distracting them or exhibiting behavioral extremes.  
18 (Tr. 156-157.)

19 On July 28, 2006, Dr. McRae examined Plaintiff. Dr. McRae  
20 diagnosed Plaintiff with post traumatic stress disorder; major  
21 depressive disorder, recurrent with questionable psychotic features;  
22 substance dependence in sustained full remission; histrionic  
23 personality traits; rule out learning disability, spelling; and rule  
24 out borderline intellectual functioning. (Tr. 257.) He found that  
25 Plaintiff's exaggeration of her levels of symptoms confounded his  
26 attempt to get an accurate view of how she functions on a day-to-day  
27 basis. (Tr. 258.) However, Dr. McRae concluded that she would be  
28 able to sustain simple work tasks primarily away from other people.

1 (Tr. 258.)

2 On March 5, 2007, Ms. Jamieson-Turner examined Plaintiff under  
3 the supervision of Dr. Rosekrans. (Tr. 277-285.) As noted above,  
4 the PAI and MMPI suggested exaggeration and malingering. (Tr. 280,  
5 285.) Plaintiff was diagnosed with undifferentiated somatization  
6 disorder and personality disorder, NOS, and given a global  
7 assessment of functioning score of 60.<sup>1</sup>

8 Medical expert Walter Scott Mabee, Ph.D., testified at the  
9 administrative hearing held on February 7, 2008. (Tr. 540-550.)  
10 Dr. Mabee stated that Plaintiff's mental impairments did not meet or  
11 equal a Listings impairment. Dr. Mabee testified that, without  
12 substance abuse, Plaintiff has mild restrictions in activities of  
13 daily living and mild to moderate difficulties in social  
14 functioning, but there was insufficient evidence to assess  
15 Plaintiff's difficulties with concentration, persistence or pace.  
16 Dr. Mabee indicated that additional testing for cognitive abilities  
17 would be helpful. The ALJ later ordered a consultative exam.

18 On March 4, 2008, Dr. Rosekrans examined Plaintiff and noted  
19 that inconsistencies in her history, drug-seeking behaviors, and  
20 over-reporting of symptoms suggested some degree of malingering.  
21 (Tr. 494.) He diagnosed undifferentiated somatoform disorder; other  
22 substance-related disorder, NOS: prescription pain medication  
23 seeking and abuse; personality disorders, NOS (mixed personality

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24 <sup>1</sup> A GAF of 51 to 60 indicates moderate symptoms (e.g., flat  
25 affect and circumstantial speech, occasional panic attacks), or  
26 moderate difficulty in social, occupational, or school function  
27 (e.g., few friends, conflicts with peers or co-workers). DIAGNOSTIC  
28 AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 32 (4th ed. 1994).

1 disorder with borderline, antisocial, schizotypal, obsessive-  
2 compulsive, and avoidant features); and borderline intellectual  
3 functioning. (Tr. 495.) He also gave Plaintiff a GAF score of 45.<sup>2</sup>  
4 However, as indicated by the ALJ (Tr. 16), the narrative portion of  
5 Dr. Rosekrans' report does not reflect "serious symptoms," and Dr.  
6 Rosekrans' checkbox form indicated, at most, only mild limitations.<sup>3</sup>  
7 (Tr. 487-502.) The ALJ properly discounted this portion of Dr.  
8 Rosekrans' medical report, the GAF score of 45, as it was  
9 inconsistent with Dr. Rosekrans's overall assessment. (Tr. 16.)

10 Other than the properly discounted GAF score of 45, the mental  
11 limitations assessed by the ALJ in this case are in accord with the  
12 reports of Drs. Mabee and Rosekrans. Moreover, the opinions of  
13 these medical professionals are consistent with the findings of Dr.  
14 McRae on January 15, 2006, and July 28, 2006.

15 While Plaintiff argues that the ALJ erred by failing to  
16 acknowledge Dr. Mabee's testimony regarding the presence of a mood  
17 disorder under Listing 12.04 (Ct. Rec. 13 at 13), the ALJ properly  
18 analyzed the record, found severe mental impairments and analyzed

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19 <sup>2</sup> A GAF of 50-41 reflects: "[s]erious symptoms (e.g., suicidal  
20 ideation, severe obsessive rituals, frequent shoplifting) or any  
21 serious impairment in social, occupational, or school functioning  
22 (e.g., no friends, unable to keep a job)." DIAGNOSTIC AND STATISTICAL  
23 MANUAL OF MENTAL DISORDERS-IV 32 (4<sup>th</sup> ed. 1994).

24 <sup>3</sup> Dr. Rosekrans completed a Medical Source Statement of  
25 Ability to do Work-Related Activities (Mental) and found either no  
26 limitations or mild limitations (with mild defined as a slight  
27 limitation, but the individual can generally function well) in all  
28 categories of Plaintiff's mental functioning. (Tr. 500-501.)

1 the severity of Plaintiff's mental limitations. (AR 14.) The ALJ  
2 accounted for Plaintiff's supported limitations in his RFC  
3 determination. The ALJ's evaluation of the evidence and the  
4 functional limitations imposed by the combination of Plaintiff's  
5 impairments are more important than descriptive labels. 20 C.F.R.  
6 § 416.923. At most, the ALJ's omission of identification of a "mood  
7 disorder" as a separate severe impairment is harmless error. *Lewis*  
8 *v. Astrue*, 498 F.3d 909, 911 (9<sup>th</sup> Cir. 2007) (the ALJ's consideration  
9 of limitations at step 4 rendered harmless any error in failing to  
10 include the impairment at step 2); *Stout v. Comm'r of Soc. Sec.*, 454  
11 F.3d 1050, 1055 (9<sup>th</sup> Cir. 2006) (where a mistake is nonprejudicial  
12 or irrelevant to the ALJ's ultimate disability conclusion it is  
13 harmless error).

14 **B. Physical Limitations**

15 Plaintiff also argues the ALJ's finding that Plaintiff is  
16 capable of a restricted range of light duty work is contrary to the  
17 opinion of Barbara Tritt, PA-C, and evidence submitted to the  
18 Appeals Council following the ALJ's decision. (Ct. Rec. 13 at 11.)

19 **1. Barbara Tritt, PA-C**

20 Plaintiff asserts the ALJ failed to give proper weight to the  
21 opinion of Ms. Tritt, PA-C. (Ct. Rec. 13 at 11).

22 In August 2005, Ms. Tritt completed a physical evaluation form  
23 which indicated that Plaintiff was limited to sedentary work. (Tr.  
24 217-220.) Ms. Tritt, a certified physician assist, is not a  
25 physician. Therefore, her testimony and opinions do not qualify as  
26 "medical evidence . . . from an acceptable medical source" as  
27 required by the Social Security regulations. 20 C.F.R. §§ 404.1513,  
28 416.913. Only acceptable medical sources can give medical opinions.

1 20 C.F.R. § 416.927(a)(2).

2 No other medical sources during the relevant time period have  
3 opined that Plaintiff was limited to sedentary work, except for  
4 Jeremy Larson, M.D. (Tr. 209-215.) However, Dr. Larson's March  
5 2005 report indicates that Plaintiff could lift up to 30 pounds.  
6 (Tr. 214.) As noted by the ALJ, being able to lift 30 pounds is  
7 consistent with light or medium exertion level work, not sedentary  
8 work. (Tr. 16.) The ALJ's conclusion that Plaintiff is capable of  
9 light duty work is also supported by the June 13, 2006, opinion of  
10 Norman Staley, M.D. (Tr. 17, 134-141.) This non-examining  
11 physician found that Plaintiff could occasionally lift and carry 20  
12 pounds and frequently lift and carry 10 pounds. (Tr. 135.) In any  
13 event, the jobs identified by the vocational expert in this matter,  
14 and cited by the ALJ in his step five determination, are sedentary  
15 level positions. (Tr. 18, 582-583.)

16 **2. Lylanya Cox, M.D.**

17 After the ALJ's April 21, 2008 decision was filed, Plaintiff  
18 submitted records from Dr. Cox for the period February 2008 through  
19 May 2008. (Tr. 507-526.) Plaintiff also submitted a physical  
20 evaluation form completed by Dr. Cox on January 15, 2009. (Tr. 531-  
21 534.) On this form, Dr. Cox opines that Plaintiff is limited to  
22 sedentary level work. The Appeals Council considered this evidence  
23 and determined that it did not provide a basis for changing the  
24 ALJ's decision.

25 This court has jurisdiction to remand matters on appeal for  
26 consideration of newly discovered evidence. *Goerg v. Schweiker*, 643  
27 F.2d 582, 584 (9<sup>th</sup> Cir. 1981); 42 U.S.C. § 405(g). Section 405(g)  
28 expressly provides for remand where new evidence is "material" and



1 there is "good cause" for the failure to incorporate the evidence in  
2 a prior proceeding. *Burton v. Heckler*, 724 F.2d 1415, 1417 (9<sup>th</sup> Cir.  
3 1984). To be material, the new evidence must bear directly and  
4 substantially on the matter in issue. *Key v. Heckler*, 754 F.2d  
5 1545, 1551 (9<sup>th</sup> Cir. 1985). Also, there must be a reasonable  
6 possibility that the new evidence would have changed the outcome if  
7 it had been before the Secretary. *Booz v. Secretary of Health and*  
8 *Human Services*, 734 F.2d 1378, 1380-81 (9<sup>th</sup> Cir. 1984).

9 First, the new evidence is not material. Dr. Cox's physical  
10 evaluation form was completed over eight months after the ALJ's  
11 decision. It is therefore immaterial because it does not address  
12 claimant's medical status during the relevant period at issue in  
13 this action. Plaintiff has also not shown a reasonable possibility  
14 of changing the outcome of the ALJ's determination with the new  
15 evidence. As noted above, all three jobs identified by the  
16 vocational expert in this matter, and cited by the ALJ as jobs  
17 existing in significant numbers that Plaintiff can perform, are  
18 sedentary level positions. (Tr. 18, 582-583.)

19 Moreover, Plaintiff has not shown good cause for her failure to  
20 incorporate the records prior to the ALJ's decision. Plaintiff  
21 offers no reason why she had not solicited this information earlier.  
22 *See, e.g., Allen v. Secretary of Health and Human Services*, 726 F.2d  
23 1470, 1473 (9<sup>th</sup> Cir. 1984) (seeking out a new success with the agency  
24 does not establish "good cause"). Since Plaintiff fails to meet the  
25 materiality and "good cause" requirements, the court is unable to  
26 consider the newly submitted evidence. (Tr. 507-534.)

27 It is the responsibility of the ALJ to resolve conflicts in  
28 medical testimony and resolve ambiguities. *Saelee v. Chater*, 94

1 F.3d 520, 522 (9<sup>th</sup> Cir. 1996). The court thus has a limited role in  
2 determining whether the ALJ's decision is supported by substantial  
3 evidence and may not substitute its own judgment for that of the ALJ  
4 even if it might justifiably have reached a different result upon de  
5 novo review. 42 U.S.C. § 405(g). Contrary to Plaintiff's argument,  
6 the record does not support a more restrictive RFC determination  
7 than as assessed by the ALJ in this matter.

#### 8 CONCLUSION

9 As determined above, the ALJ's RFC finding was proper in this  
10 case. Accordingly, the ALJ properly concluded that Plaintiff was  
11 capable of light exertion level work but could only occasionally  
12 climb, stoop, kneel, crouch, and crawl, only sit for 30 minutes at  
13 a time and stand for one hour at a time, and was moderately limited  
14 in her ability to get along with coworkers or peers without  
15 distracting them or exhibiting behavioral extremes. (Tr. 14-15.)

16 Vocational expert Dr. Joseph A. Moisan testified that based on  
17 a hypothetical which included the limitations assessed by the ALJ in  
18 this case, the individual would be capable of performing work as an  
19 order caller, a ticket seller and film touch-up inspector, jobs that  
20 exist in significant numbers in the national economy. (Tr. 582-  
21 583.) All three jobs identified by the vocational expert are  
22 sedentary exertion level positions. *Id.* At step five of the  
23 sequential evaluation process, the ALJ found that, based on  
24 Plaintiff's age, education, work experience, RFC and the vocational  
25 expert's testimony, Plaintiff was capable of performing other work.

26 This court must uphold the Commissioner's determination that  
27 Plaintiff is not disabled if the Commissioner applied the proper  
28 legal standards and there is substantial evidence in the record as

1 a whole to support the decision. Having reviewed the record and the  
2 ALJ's conclusions, the court finds that the ALJ's decision is  
3 supported by substantial evidence and free of legal error.  
4 Plaintiff is thus not disabled within the meaning of the Social  
5 Security Act. Accordingly,

6 **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is  
8 **DENIED.**

9 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is  
10 **GRANTED.**

11 3. The District Court Executive is directed to enter judgment  
12 in favor of Defendant, file this Order, provide a copy to counsel  
13 for Plaintiff and Defendant, and **CLOSE** this file.

14 DATED October 18, 2010.

15  
16 S/ CYNTHIA IMBROGNO  
17 UNITED STATES MAGISTRATE JUDGE  
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